

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF PROFESSIONAL STANDARDS**

In the Matter of WIC Vendor)	
Participation of:)	Docket No. 01-10-C-1069WC
)	
SUNG C. LEE,)	FINDINGS OF FACT,
(ROY'S MARKET))	CONCLUSIONS OF LAW,
)	AND FINAL ORDER
Respondent.)	
_____)	

A hearing was held before Health Law Judge Art DeBusschere, Presiding Officer for the Department of Health on May 1, 2002 at Hearing Rooms, Suite 100, 15 West Yakima Avenue, Yakima, Washington. Karen Ann Jensen, Assistant Attorney General, represented the WIC Program (the WIC Program), and Sung C. Lee, owner of Roy's Market (the Respondent), represented himself. Sai C. Kang, certified interpreter, served as a Korean interpreter. Louise R. Bell, CCR, was the court reporter.

I. PROCEDURAL HISTORY

11 On September 27, 2001, the WIC Program sent a letter to the Respondent notifying him that Roy's Market was being disqualified from the WIC Program for three years (the Notice of Disqualification). The WIC Program also notified the Respondent that it was going to conduct an audit of WIC food purchases.

12 On October 23, 2001, the Respondent filed an Appeal of Disqualification from WIC Program.

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13 On October 24, 2001, the Adjudicative Clerk Office served a Scheduling Order/Notice of Hearing scheduling a prehearing conference for November 15, 2001, and the hearing for November 30, 2001.

1.4 A prehearing conference was held on November 15, 2001. The Senior Health Law Judge discussed the identification of witnesses and the submission of exhibits. Granting the Respondent's request, the Presiding Officer continued the hearing to January 18, 2002. Prehearing Order No. 1.

15 On January 7, 2002 (issued January 4, 2002), the WIC Program filed an Amendment to the Notice of Disqualification. Based upon an audit, the Amendment alleged two additional violations. The WIC Program also made a claim for reimbursement (Claim for Reimbursement) in the amount of \$4,667.91.

1.6 On January 15, 2002, the Presiding Officer entered an Order on Motion to Continue. The Presiding Officer granted the Program's motion for continuance to allow the parties additional time to consider and to prepare for the two additional allegations. The hearing was continued to March 12, 2002. Prehearing Order No. 2.

1.7 On March 5, 2002, the Program filed a Motion to Continue because its primary witness was not available to testify. The Presiding Officer conducted a prehearing conference on March 12, 2002, granted the Program's motion, and continued the hearing to May 1, 2002. Prehearing Order No. 3.

II. THE HEARING: ISSUES, WITNESSES AND EXHIBITS

2.1 Issues. There are two issues in this matter:

Issue Number One: Should the WIC Program's Notice of Disqualification of the Respondent's participation in the WIC Program for 3 years effective November 1, 2001, be affirmed?

Issue Number Two: Should the WIC Program's notice ordering reimbursement in the amount of \$4,667.91 be affirmed?

2.2 Witnesses. Rebecca Waite and Timothy Hustead testified for the WIC Program. The Respondent testified on his behalf.

2.3 Exhibits. The Health Law Judge admitted the following exhibits:

Program's Exhibit No. 1: WIC Retailer Handbook, May 2000 - March 2003 Contract Period, Washington State WIC Program.

Program's Exhibit No. 2: Roy's Market Request for WIC Authorization, January 1997.

Program's Exhibit No. 3: Roy's Market WIC Vendor Contract, April 1, 1997 through March 31, 1999.

Program's Exhibit No. 4: Roy's Market Request for WIC Authorization, October 1998.

Program's Exhibit No. 5: Roy's Market WIC Vendor Contract, April 1, 1999 through March 31, 2001.

Program's Exhibit No. 6: Roy's Market Request for WIC Authorization, March 2000

Program's Exhibit No. 7: Roy's Market WIC Vendor Contract, May 2000 through March 2003.

Program's Exhibit No. 8: WIC Investigator Report, May 31, 2001.

Program's Exhibit No. 9: WIC Investigator Report, June 4, 2001.

Program's Exhibit No. 10: WIC Investigator Report, June 19, 2001.

Program's Exhibit No. 11: WIC Investigator Report, July 24, 2001.

Program's Exhibit No. 12: WIC Investigator Report, August 9, 2001.

Program's Exhibit No. 13: WIC Investigator Report, August 28, 2001.

Program's Exhibit No. 14: WIC Program Disqualification Letter, September 27, 2001.

Program's Exhibit No. 15: Roy's Market Response to Program's Disqualification Letter, October 8, 2001.

Program's Exhibit No. 16: Roy's Market Purchase Inventory Records

Program's Exhibit No. 17: WIC Program Food Quantity Purchased reports, May through August 2001.

Program's Exhibit No. 18: Independent Accountant's Report, N.R. Smith and Associates.

Program's Exhibit No. 19: WIC Program Amended Disqualification Letter, January 4, 2002.

Program's Exhibit No. 20: WIC Program Calculation and Claim Invoice.

III. FINDINGS OF FACT

THE WIC PROGRAM AND THE VENDOR CONTRACT.

3.1 The Washington State Department of Health administers the federal Special Supplemental Nutrition Program for Woman, Infants and Children (the WIC Program) through the Department's Office of Community Wellness and Prevention.

3.2 In January 1997, Sung C. Lee, the Respondent, submitted an application for WIC retailer authorization for his store, Roy's Market, in Yakima, Washington. Respondent's Exhibit No. 2.

3.3 The Program approved the Respondent's application for WIC vendor authorization and the Respondent subsequently signed a WIC retailer contract effective from April 1, 1997 through March 31, 1999. Program's Exhibit No. 3.

3.4 The Respondent's WIC vendor contract for Roy's Market has been renewed for two consecutive periods following his original contract. Program's Exhibit No. 3-7. The current contract is effective through March 31, 2003. (the WIC Vendor Contract) Program's Exhibit No. 7, p. 4.

3.5 In applying for the original contract and both renewals, the Respondent indicated that he did not "need an interpreter or need materials in other languages."

Program's Exhibit No. 2, p. 2; Program's Exhibit No. 4, p. 2; Program's Exhibit No. 6, p. 2. Thus, all documentation provided to the Respondent by the Department in connection with WIC vendor contracts for Roy's Market has been in English only.

3.6 Under the "Special Terms and Conditions" of the WIC vendor Contract, the Respondent agreed that he would ensure that Roy's Market would:

- a. Stocked sufficient quantities of authorized WIC foods;
- b. Enter the actual purchase price on each WIC check prior to the customer countersigning the check;
- c. Stock store shelves with authorized WIC foods that have not expired;
- d. Redeem WIC checks for only the supplemental WIC foods specified on the check;
- e. Provide WIC foods at the current price or less than the current price charged to other customers; and
- f. Maintain inventory records substantiating the volume and prices of WIC-approved foods sold.

Program's Exhibits Nos. 3, 5, and 7. In addition to the above list, the Respondent agreed to other "Special Terms and Conditions" as well other "General Terms and Conditions."

3.7 The WIC Retailer Handbook provided the Respondent with information about the WIC Program, the WIC retailers' responsibilities, the checkers' responsibilities, the WIC retailer training, WIC checks, and WIC-approved foods. The WIC Retailer Handbook shows how a check is to be processed and signed when the client presents it to the WIC retailer for specific WIC-approved foods at an agreed upon food price. Program's Exhibit No. 1.

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3.8 Each approved WIC retailer is required to ensure that the store manager and all checkers receive training on WIC program requirements. WAC 246-790-085 (24) & (25). The WIC retailer agrees to keep two copies of the WIC Retailer Handbook on site (one at the front of the store and one with the bookkeeper). Program's Exhibit No. 1, "Company Responsibilities," page 4, Paragraph 4(d). The WIC Retailer Handbook lists all WIC-approved foods and specifies the minimum stock levels that must be maintained for each WIC-approved food product. Program's Exhibit No. 1, pp 39-44, 125-153. The Handbook includes other information pertinent to participation as WIC retailers, including a copy of Chapter 246-790. Program's Exhibit No. 1, pp. 19-30.

COMPLAINEE MONITORING OF ROY'S MARKET.

3.9 The WIC Program sent investigators to Roy's Market in Yakima, Washington to conduct undercover purchases for purposes of assessing the Respondent's compliance with the WIC Program and the Respondent's WIC Vendor Contract. Timothy Hustead, WIC Investigator, made undercover purchases at Roy's Market on May 31, 2001, June 19, 2001, July 24, 2001 and August 9, 2001. Sylvia Matthews, WIC Investigator, made an undercover purchase on August 28, 2001.

The May 31, 2001 Compliance Purchases.

3.10 On May 31, 2001, Timothy Hustead went to Roy's Market and took with him a WIC check number 6399, which authorized the purchase of specific WIC-approved foods up to a maximum dollar value of \$39.29. Program's Exhibit No. 8, p. 5. At Roy's Market, Mr. Hustead observed that no WIC-approved cheese or frozen juice was available for purchase. He noted the following quantities of other WIC-approved

foods: 6 or 8 boxes of cereal, 8 or 10 jars of peanut butter, 1 can Enfamil powdered formula, and expired Prosobee products (15 cans of powdered formula that expired during 1999, and numerous cans of concentrate that expired during 1998).

3.11 During this undercover purchase on May 31, 2001, Mr. Hustead proceeded to the checkout stand with the following foods: milk, cereal, beans, eggs and a 46 oz plastic bottle of Seneca grape juice. The Respondent had Mr. Hustead countersign the WIC check prior to any prices having been entered on the check.

Mr. Hustead did not witness any cash register activity, and he did not receive a sales receipt. The Seneca bottled grape juice was not a WIC-approved food. Program's Exhibit No. 1, pp. 131-132. The bottle expiration date was 1994. All WIC-approved food purchased by Mr. Hustead using WIC check number 6399 came to a total of \$16.54. Program's Exhibit No. 8, p. 2. Later, the Respondent redeemed this check for payment in the amount of \$33.80. Program's Exhibit No. 8, p. 5.

The June 4, 2001 Compliance Purchases.

3.12 On June 4, 2001, Mr. Hustead went to Roy's Market and took with him WIC check number 6402, authorizing him to purchase of four cans of Enfamil with iron powdered formula, with the total purchase not to exceed \$57.16. Program's Exhibit No. 9, p. 5. During this undercover purchase, Mr. Hustead observed approximately 12 to 15 cans of Enfamil with iron powdered formula on the shelf. He proceeded to the check out stand with four cans of formula as designated on the WIC check number 6402. At the checkout stand, the Respondent had Mr. Hustead countersign the WIC check without any price entered. The formula purchase was not rung up on the cash

register, and Mr. Hustead did not see the formula “scanned” with the register scanner. The Respondent did not provide a sales receipt.

3.13 After the Respondent bagged the formula during the undercover purchase on June 4, 2001, Mr. Hustead went back and picked up a can of soda. He paid cash for the soda. The Respondent scanned the soda with the register scanner and rang the sale up on the cash register. Mr. Hustead did not observe the Respondent use the cash register scanner to scan any of the WIC-approved foods.

3.14 The Respondent had previously indicated to the WIC Program that he would charge \$12.99 per each one-pound can of Enfamil with iron powdered formula. Program's Exhibit No. 6, p. 3. All WIC-approved formula purchased by Mr. Hustead using WIC check number 6402 came to a total of \$51.96. Program's Exhibit No. 6, p. 3. Program's Exhibit No. 9, p. 2. Later, the Respondent redeemed WIC check number 6402 for payment in the amount of \$55.96. Program's Exhibit No. 9, p. 5.

The June 19, 2001 Compliance Purchases.

3.15 On June 19, 2001, Mr. Hustead went to Roy's Market and took WIC checks with him (check numbers: 6662, 6663, 6664, 6665 and 6666). Program's Exhibit No. 10, pp 7-12. During this purchase, Mr. Hustead observed deficiencies in Roy's Market of WIC food items. He observed 5 or 6 pounds total of WIC-approved cheese, four boxes of WIC-approved cereal, and only 5 cans of WIC-approved formula available for purchase. He proceeded to the checkout stand with the WIC-approved foods: Enfamil formula, cheese, pinto beans, milk, apple juice, eggs, cereal. He

included a 22-oz. bottle of beer (Olde English 800 Malt Liquor) with the other items. Program's Exhibit No. 10, p. 2.

3.16 At the checkout stand and after the Respondent reviewed the WIC checks, the Respondent added a three pound can of Enfamil with iron. At the Respondent's urging, Mr. Hustead picked up additional milk and juice. After bagging the foods, the Respondent rang up the beer on the cash register. When Mr. Hustead indicated he did not have any money, just the WIC checks, the Respondent added the beer to the bags of food. Program's Exhibit No. 10, p. 3. During his testimony, Mr. Hustead stated that he did not offer cash, told the Respondent that he did not have any personal cash but just the WIC checks. During rebuttal testimony, Mr. Hustead testified that he placed the beer on the counter with the WIC foods. He did not touch the bottle again and the Respondent put the bottle of beer in the bag along with the other WIC foods.

3.17 During the purchase on June 19, 2001, the Respondent allowed Mr. Hustead to countersign all five WIC checks without any prices having been entered on the checks. The Respondent did not provide a sales receipt. Program's Exhibit No. 10, p. 5. Mr. Hustead did not observe the Respondent scanning any of the WIC-approved foods or ringing those foods up on the cash register. The 22-oz bottle of beer and the three-pound can of Enfamil with iron were not WIC-approved foods. Program's Exhibit No. 1, pp. 125-153. (infant formula, p. 149). All WIC-approved foods purchased by Mr. Hustead, using WIC checks numbers: 6662, 6663, 6664, 6665 and 6666, came to a total of \$97.75. Program's Exhibit No. 10, p. 2. Later, the Respondent redeemed

these WIC checks for payment in the amount of \$145.41. Program's Exhibit No. 10, pp. 7-11.

3.18 The Respondent denied selling the beer to Mr. Hustead using the WIC vouchers. The Respondent testified that Mr. Hustead stated that he liked the beer and that the bottle just disappeared. The Respondent testified that while he was dividing up the WIC checks, the Mr. Hustead took the beer and left the store. The Respondent testified that Mr. Hustead did not look like a thief, and the Respondent thought that he would bring back the money for the beer. The Respondent testified that he did not charge the beer to the WIC vouchers.

3.19 After considering the testimony of the Respondent and of Mr. Hustead, the Presiding Officer found Mr. Hustead credible and the Respondent not credible. WAC 34.05.461(3). There was an overcharge of the WIC foods for purchases that day of \$47.66 and there was no receipt provided for the foods purchased. Mr. Hustead wrote his account of the incident immediately after the event and was detailed in his explanation about it. The Respondent's explanation was not convincing when explaining that Mr. Hustead left the store with the beer without purchasing it, especially when Mr. Hustead was present in front of the Respondent at the time. In this case, the Presiding Officer finds that the Respondent exchanged a 22-oz. bottle of beer at Roy's Market for the WIC vouchers on June 19, 2001.

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The July 24, 2001 Compliance Monitoring

3.20 On July 24, 2001, Mr. Hustead went to Roy's Market and used his personal cash to purchase one bottle of beer. Mr. Hustead observed that there were no cans of infant formula on the shelf. Program's Exhibit No. 11.

The August 9, 2001 Compliance Purchases.

3.21 On August 9, 2001, Mr. Hustead went to Roy's Market and took WIC checks with him (check numbers 7077, 7078, 7079, 7080 and 7081). Mr. Hustead observed an insufficient stock of WIC cereals available for purpose, and he observed that no Prosobee infant formula was available for purchase. Program's Exhibit No. 12, p. 2. Mr. Hustead picked up the following WIC-approved foods: Enfamil with iron powdered formula, cheese, eggs, cereal, apple juice, beans, and milk. He also picked up the following non-WIC-approved foods: one bottle of beer (Olde English 800 Malt Liquor) and one gallon of Citrina citrus punch.

3.22 With these items, Mr. Hustead proceeded to the checkout stand. The items were totaled with an electronic keypad and the total dollar amount was displayed on a screen. The Respondent refused to allow Mr. Hustead to pay for the beer with a WIC check. The Respondent insisted Mr. Hustead purchase additional milk and juice beyond the quantity that Mr. Hustead had selected, stating he "couldn't make any money" if Mr. Hustead did not purchase these additional items. Program's Exhibit No. 12, p. 3. The Respondent entered the amounts on the checks and had Mr. Hustead sign the WIC check. The Respondent did not provide a sales receipt. The Citrina citrus punch was bagged along with the WIC-approved foods. The Respondent did not

request any cash payment for the Citrina citrus punch. All WIC-approved foods purchased by Mr. Hustead, using WIC checks numbers 7077, 7078, 7079, 7080 and 7081, came to a total of \$119.79. Program's Exhibit No. 12, p. 2. Later, the Respondent redeemed the WIC checks for payment in the amount of \$123.93. Program's Exhibit No. 12, pp 4-8.

The August 28, 2001 Compliance Purchases

3.23 On August 28, 2001, Ms. Matthews went to Roy's Market and took WIC checks (Check Numbers 7215, 7216, 7217, 7218 & 7219). Program's Exhibit No. 13. Ms. Matthews reported that shelf stocks of WIC-approved cereal and formulas were "low." She attempted to purchase a package of cigarettes along with the WIC-approved foods designated on her WIC checks. The clerk refused to allow the purchase of the cigarettes for the WIC checks. She was not given a receipt for her purchases. All WIC-approved foods purchased by Ms. Matthews using WIC checks came to a total of \$95.75. Program's Exhibit No. 13, p. 2. Later, the Respondent redeemed the WIC check for payment in the amount of \$105.13. Program's Exhibit No. 13, pp. 4-8.

3.24 On September 27, 2001, the WIC Statewide Operations Section Manager Rebecca Waite sent the Respondent a letter outlining the results of the compliance purchases by Mr. Hustead and Ms. Matthews. Program's Exhibit No. 14. The letter notified the Respondent that Roy's Market was being disqualified for the WIC Program for three years as required under federal regulations. The Program also requested a reimbursement in the amount of eighty-two and 44/100 dollars (\$82.44) to the

Department for cost of ineligible foods sold and for overcharges documented during the investigation. The Respondent paid the Program this amount.

THE COMPLIANCE AUDIT FOR MAY THROUGH AUGUST OF 2001.

3.25 The September 27, 2001 Notice of Disqualification letter also informed the Respondent that the Program was going to conduct an audit of WIC food purchases. Program's Exhibit No. 14, p. 1. The Program requested that the Respondent provide “copies of invoices showing the purchase of 16-ounce powdered Enfamil with Iron, domestic cheese, WIC authorized juices, and WIC authorized cereals for the period May 2001 through August 2001.” Program's Exhibit No. 14, pp. 1-2.

3.26 On April 17, 2001, the WIC Program had sent a letter to the Respondent requesting an updated Food Price List for Roy's Market. As of September 27, 2001, Roy's Market had not submitted it.

3.27 On October 15, 2001, the WIC Program received from the Respondent a written response to the September 27, 2001 disqualification. Program's Exhibit No. 15, pp. 1-2. Ten pages of store inventory purchase records accompanied the Respondent's response. Program's Exhibit No. 16, pp 1-10.

3.28 On October 23, 2001, the WIC Program staff reviewed all WIC vouchers redeemed at Roy's Market for the months of May through August 2001. The information from the vouchers with respect to Enfamil with iron, domestic cheese, WIC-approved juices and WIC-approved cereals was compiled into a “Food Quantity Purchased Report” for each of these months. The reports reflect the quantities of these four WIC-approved foods for which Roy's Market was compensated when the vouchers were redeemed for payment. Program's Exhibit No. 17, pp. 1-4.

3.29 In November 2001, the WIC Program arranged for an independent audit

of the inventory records provided by the Respondent. NR Smith and Associates performed the audit (the November 2001 Audit). Program's Exhibit No. 18.

3.30 The November 2001 Audit focused on the four WIC-approved foods: (1) Enfamil with iron, (2) domestic cheese, (3) WIC-approved juices and (4) WIC-approved cereals. For these four foods, the auditor was asked to compare the Food Quantity Purchased Reports for May through August 2001 with the Roy's Market inventory records for this same time period. Program's Exhibit No. 18, p. 1. Based upon this comparison, the auditor was asked to identify whether there were any variances between the food quantities sold to WIC (as documented on the Food Quantity Purchased Reports) and the food quantities purchased by Roy's Market for inventory on the store's shelves.

3.31 The auditor for the November 2001 Audit prepared a written report, which stated the following:

- a. Roy's Market did not provide any records for May 2001 (Program's Exhibit No. 18, p. 1);
- b. None of the inventory purchase records for May through August 2001 included cereal (Program's Exhibit No. 18, p. 1);
- c. The inventory purchase records show a lower level of Enfamil purchased each month than was reflected on the WIC Food Quantity Purchased Reports as being sold (Program's Exhibit No. 18, p. 2); and
- d. The inventory purchase records show a lower level of cheese purchased each month than was reflected on the WIC Food

Quantity Purchased Reports as being sold (Program's Exhibit No. 18, p. 2).

(Citations to Program's Exhibit Added.) Program's Exhibit No. 18, p. 1-3. The auditor's numerical findings were summarized in a report titled "Schedule of Purchases and Amounts Sold, May 2001 to August 2001." Program's Exhibit No. 18, p. 4.

3.32 The November 2001 Audit report revealed discrepancies (or variances) for each of the four WIC-approved foods. A positive variance revealed that there were inventory records indicating that the products were in excess of WIC purchases. A negative variance revealed that there were no inventory records to show that the products were available. The November 2001 Audit showed that WIC foods were not available to purchase in the categories of goods where there was a negative variance. The November 2001 Audit indicated that the Respondent must have been allowing WIC clients to redeem WIC vouchers for non-WIC-approved foods. The November 2001 Audit showed that the WIC Program had paid the Respondent for submitted WIC vouchers for non-WIC-approved foods sold and/or for foods that the Respondent could not substantiate purchasing.

3.33 The numerical findings in the November 2001 Audit showed that the Respondent could not have actually sold all of the WIC-approved foods for the submitted WIC voucher the WIC Program paid. For example, the WIC vouchers, redeemed for cereal during May through August 2001, reflected a total 5,148 ounces of WIC-approved cereal to WIC clients (792+1296+1548+1512 ounces). See, Program's Exhibit No. 18, p. 3; Program's Exhibit No. 20 p. 1 ("sales" column for cereal). However, the purchase inventory records submitted by Roy's Market for that time period

do not reflect the purchase of any WIC-approved cereal. See, Program's Exhibit No. 16. As a result, Roy's Market had a negative variance of 5,148 ounces of cereal during the audit time period. Program's Exhibit No. 18, p. 3 (negative variance column for cereal indicated in parenthesis); Program's Exhibit No. 20, p. 1 (total line, negative variance column). Similarly, the audit determined that Roy's Market maintained negative variances during the audit period for the following WIC-approved foods: Enfamil with Iron (16 oz cans) - negative variance of 228 cans; Juice (cans) - negative variance of 92 cans; and cheese – negative variance of 111 pounds. See, Program's Exhibit No. 18, p. 3; Program's Exhibit No. 20, p. 1 (total lines, negative variance column).

3.34 The Presiding Officer finds that the Program reasonably calculated the amount of the reimbursement owed using the price of WIC foods provided by the Respondent and the negative variance for each of the four categories of WIC foods audited. The Program showed by a preponderance of the evidence that it was entitled to reimbursement in the amount of \$4,667.91 for overcharges related to the negative variance in food units in the four WIC-approved foods, which were examined in the November 2001 audit. Program's Exhibit No. 20.

3.35 The Presiding Officer also finds that the November 2001 Audit showed that the Respondent failed to maintain inventory records required in the WIC Vendor Contract, "General Terms and Conditions, No. 8." Program Exhibit No. 7, p. 8. The Presiding Officer finds that the Respondent failed to stock sufficient quantities of WIC-

approved foods required in the WIC Vendor Contract “Special Terms and Conditions, No. 4.e.” Program Exhibit No. 7, p. 2.

IV. CONCLUSIONS OF LAW

THE WIC PROGRAM.

4.1 The WIC program was established by the Child Nutrition Act of 1966, now codified with subsequent amendments as 42 U.S.C. §1786 et seq. The Food and Nutrition Service within the United States Department of Agriculture administers the program and provides funds to the State of Washington, Department of Health, WIC Program for distribution of benefits in accord with federal rules.

4.2 The WIC Program has incorporated by reference into its administrative rules the federal regulations governing the WIC Program (7 CFR Part 246). WAC 246-790-050 (2). The Department of Health has jurisdiction over this matter.

4.3 The purpose of the WIC Program is to serve as an adjunct to health care by providing nutritious food, nutrition education, and health screening and referral services to pregnant and breast-feeding women, infants, and children in certain high-risk categories. WAC 246-790-050(2).

CLIENTS PURCHASE OF WIC-APPROVED FOODS FROM WIC RETAILERS.

4.4 Clinics across the state of Washington issue the WIC checks to clients to purchase food at local retailers participating in the WIC Program. Retailers are required to enter into written contracts with the department. WAC 246-790-080(1). 7 C.F.R. § 246.12(h)(1)(i). In this case, the Respondent (Roy's Market) entered into a written contract with the WIC Program.

REQUIREMENT FOR WIC RETAILERS.

4.5 The expectations for WIC retail contractors (“WIC retailers”) are set forth in federal regulations and in the Washington Administrative Code. See, 7 C.F.R. § 246; chapter 246-790 WAC. These expectations are also detailed in the contract signed by each WIC retailer. Failure to comply with a WIC vendor contract is a violation of a Program rule. WAC 246-790-085(1). In addition, the federal regulation set forth vendor agreement provisions and requires the Respondent to comply with the WIC vendor contracts. 7 C.F.R. § 246.12(h)(3). Thus, when the Respondent fails to comply with certain provisions in the WIC Vendor Contract, then the Respondent would also be in violation of federal regulations. 7 C.F.R. § 246.12(h)(3)(xxii).

MONITORING OF WIC RETAILERS AND RETAILERS’ REQUIREMENTS.

4.6 In order to monitor WIC retailer contracts, the WIC Program representatives may make covert purchases using WIC checks. WAC 246-790-090. See also, 7 C.F.R. § 246.12(j)(4) (discussing compliance investigations). In this case, the Program made covert purchases at Roy’s Market using WIC checks. As a result of the Program’s compliance purchases at Roy’s Market, the following violations were found, identified as Sections A-F, as follows:

Section A. The WIC retailers are required to stock sufficient quantities of WIC-approved foods.

4.7 “The retailer must stock sufficient quantities of authorized WIC foods to meet the needs of WIC customers, but not less than the minimum stock levels.” WAC 246-790-085(2). The WIC retailer handbook provides a list of minimum stock

levels that each WIC retailer must maintain for WIC-approved foods. Program's Exhibit No. 1, pp. 39-44. WAC 246-790-085.

4.8 In this case, the WIC investigators and the November 2001 Audit revealed that the store failed to meet minimum stock level requirements for infant formula, cheese, juice and cereal. The minimum stock level for infant formula is 96 cans of concentrate (13 oz.) or 30 cans of powder (12, 14, or 16 oz.). Program's Exhibit No. 1, p. 40. The minimum stock level for WIC-approved cheese is 14 pounds. On May 31, 2001, Mr. Hustead observed only one (1) can of Enfamil Powder and no WIC-approved cheese or juice. On June 4, 2001, he observed 12-15 cans of Enfamil Powder. On June 19, 2001, he observed only 5 cans of Enfamil Powder and five to six pounds of WIC-approved cheese in stock. On July 24, 2001, there was no infant formula on the store shelves. Next, the November 2001 Audit showed no purchases by the Respondent of WIC-approved cereal from May through August 2001. Program's Exhibit No. 18. Consistent with this audit report, Mr. Hustead noted that Roy's Market failed to meet the minimum stock levels for cereal on May 31, 2001 and August 9, 2001.

4.9 The Respondent argued that he did not have Prosobee on the shelf, because clients did not buy it and so he had to throw it away when it expired. This argument was not persuasive. The Respondent failed to make a request for an exception so that he would not have to provide Prosobee on the store shelf. The Presiding Officer concludes that the Respondent consistently failed to provide minimum quantities of WIC-approved foods to meet the demands of WIC clients in violation of WAC 246-790-085(2). Further, the Respondent failed to comply with the Respondent's WIC Vendor Contract. Program's Exhibit No. 7, page 2, Paragraph 4(e). Failure to comply with the WIC Vendor Contract for this provision was also a violation of WIC

Program rules, WAC 246-790-085(1), and a federal rule, 7 C.F.R. § 246.12(h)(3)(xxii).

Section B. The WIC retailers are required to enter the purchase price on the WIC check before the customer countersigns.

4.10 “The retailer must enter the actual purchase price of the specific quantity of WIC authorized foods on each WIC check before the WIC customer countersigns the check.” WAC 246-790-085(7).

4.11 In this case, the Presiding Officer concludes that the Respondent failed to comply with WAC 246-790-085(7). During Mr. Hustead’s covert WIC compliance purchases on May 31, June 4 and June 19, 2001, the Respondent allowed Mr. Hustead to countersign WIC checks without entering prices of the WIC checks. Program's Exhibits Nos. 8,9,10 and 14. Thus, the Respondent failed to comply with WIC Program requirements as stated in his current WIC contract. Program's Exhibit No. 7, p. 3, Paragraph 4(l). The Respondent also failed to comply with federal WIC regulations. 7 C.F.R. § 246.12(h)(3)(v).

Section C. The WIC retailers are required not to sell WIC-approved foods after the foods’ expiration date.

4.12 “The retailer must not sell WIC-authorized foods after the manufacturer’s expiration date.” WAC 246-790-085(14). This is important because some expired food, such as infant formula, poses a serious threat to infant health.

4.13 In this case, the Presiding Officer concludes that the Respondent failed to comply with WAC 246-790-085(14). On May 31, 2001, Mr. Hustead noted infant

formula on the shelves at Roy's Market with manufactures' expiration dates in 1998 and 1999. The Presiding Officer also concludes that the Respondent failed to comply with WIC Program requirements as stated in his current WIC contract. Program's Exhibit No. 7, p. 3, Paragraph 4(r). Failure to comply with the WIC Vendor Contract for this provision was also a violation of WIC Program rules, WAC 246-790-085(1), and a federal rule, 7 C.F.R. § 246.12(h)(3)(xxii).

Section D. The WIC retailers are required to redeem WIC checks for only foods specified on WIC checks.

4.14 "The retailer must redeem WIC checks for only the supplemental WIC foods and in no more than the quantity specified on the check." WAC 246-790-085(11)

4.15 In this case, the Respondent on May 31, 2001 redeemed a WIC check for a purchase that included Seneca Grape Juice, which was not WIC approved. Program's Exhibit No. 1, p. 132. On June 19, 2001, the Respondent redeemed a WIC check for purchase that included a three-pound can of formula, which was greater than the amount specified on the WIC check. Program's Exhibit No. 10, pp. 7, 8. The three-pound cans are also not WIC approved. Program's Exhibit No. 1, p. 149. The 22-oz bottle of beer was not a WIC-approved food. Program's Exhibit No. 1, pp. 125-154. On August 9, 2001, the Respondent redeemed a WIC check that included a gallon of Citrina Citrus Punch, which was not WIC approved. Program's Exhibit No. 1, pp. 125-154. Further, the auditor's report indicated that Respondent must have been allowing WIC clients to redeem WIC vouchers for non-WIC-approved foods on other occasions.

4.16 The Presiding Officer concludes that by allowing the transactions with WIC checks to include non-WIC-approved foods, the Respondent failed to comply with

WAC 246-790-085(11). The Presiding Officer concludes that, the Respondent failed to comply with WIC Program requirements as stated in his current WIC contract.

Program's Exhibit No. 7, p. 3, Paragraph 4(q). The Presiding Officer concludes that the Respondent was out of compliance with a federal regulation.

7 C.F.R. § 246.12(h)(3)(ii).

Section E. The WIC retailer is required not to charge WIC-approved foods in excess of the current price.

4.17 “The retailer must provide supplemental foods at the current price or at less than the current price charged to other customers.” WAC 246-790-085(13). The WIC retailers must provide the WIC Program with current food price list at the time they apply for WIC authorization. WAC 246-790-070(2)(a). The WIC retailers must also provide the Program with updated food price list upon request.

WAC 246-790-085(29).

4.18 In this case, the Respondent redeemed WIC checks on five occasions for amounts greater than the actual total of WIC-approved foods. This resulted in an overcharge to the WIC Program, because prices were effectively greater than current price. The Respondent argued that WIC food prices he charged the Program were higher than the current price list, because he had to pay higher prices for WIC foods. He argued that he could not purchase the WIC foods from wholesalers, because he could not purchase them in large enough quantities.

4.19 The Respondent's argument that he had to pay higher prices for WIC foods was unpersuasive. If the price of the WIC food had changed, then it was the Respondent's responsibility to notify the Program. In fact, the WIC Program requested

updated price lists and the Respondent failed to provide them. In addition, the Program's November 2001 Audit showed that the Respondent overcharged the WIC Program.

4.20 The Presiding Officer concludes that the Respondent failed to provide WIC-approved foods at the current price or at less than the current price charged to other customers. The Presiding Officer concludes that in overcharging the WIC Program, the Respondent was in violation for WAC 246-790-085(13). The Presiding Officer concludes that the Respondent failed to comply with WIC Program requirements as stated in his current WIC contract. Program's Exhibit No. 7, p. 3, Paragraph 4(s). The Respondent failed to comply with his WIC contract in violation of WAC 246-790-085(1). This conduct was also in violation of the federal regulations regarding food instrument redemption requirements. 7 C.F.R. § 246.12(h)(3)(viii).

Section F. The WIC retailers are required to maintain inventory records to document inventory sold.

4.21 This rule is provide in the rules:

Retailers must maintain inventory records showing all purchases, both wholesale and retail, for a period of at least one year after the expiration of the contract with the WIC program. These inventory records include, but are not limited to, shelf price records, wholesale receipts, cash and carry receipts, purchase orders, books of account, invoices that identify the quantity and prices of specific WIC foods, and other pertinent records that substantiate the volume and prices charged and provide WIC program representatives access to those records on request.

WAC 246-790-085(28). Each retailer must provide the WIC program with a completed price list of authorized WIC foods on request, but not more than twelve times per year.

WAC 246-790-085(29). The reimbursement for the sale of specific foods must not exceed a retailer's documented inventory during that same time period.

7 C.F.R. § 246.12(l)(1)(iii)(B).

4.22 In this case, the Program asked the Respondent to provide copies of inventory purchase records for May through August 2001. Program's Exhibit No. 14, pp. 1-2. In response, the Respondent provided ten pages of records. Program's Exhibit No. 16, pp. 1-10. The Respondent did not provide inventory records for the month of May 2001. Program's Exhibit No. 18, pp. 1, 3. The Presiding Officer concludes that the Respondent failed to maintain the records as required, because of his failure to provide records for May 2001. The Respondent was out of compliance with state and federal WIC regulations. WAC 246-790-085(29).

7 C.F.R. § 246.12(h)(3)(xv). Thus, the Respondent failed to comply with WIC Program requirements as stated in his current WIC contract. Program's Exhibit No. 7, p. 8, Paragraph 8.

SANCTIONS.

4.23 Regarding sanctions, the Respondent asked that he be given another chance to comply with the WIC Program. The federal regulations, however, require that state agencies impose sanctions on a WIC retailer who fails to comply with the requirements of the WIC Program as specified in the retailer's contract. 7 C.F.R. § 246.12(l). Sanctions include mandatory disqualification from the WIC Program for serious violations. 7 C.F.R. § 246.12(l)(1). See also WAC 246-790-100; Program's Exhibit No. 7, p. 9. When multiple violations of WIC Program requirements are

observed during the courses of a single investigation, the state agency must disqualify the vendor for the period corresponding to the most serious mandatory violation.

7 C.F.R. § 246.12(l)(1)(xii). Mandatory sanctions include reimbursement for documented overcharges. WAC 246-790-100(3).

Section G. The Program is required to disqualify a WIC retailer who exchanges a WIC check for an alcoholic beverage.

4.24 A mandatory three-year disqualification from the WIC Program is required for “[o]ne incidence of the sale of alcoholic beverages or tobacco products in exchange for food instruments.” [Emphasis Added.] 7 C.F.R. § 246.12(l)(1)(iii)(A). WAC 246-790-100(6); Program's Exhibit No. 7, p. 9. In this case, the Presiding Officer heard testimony and made a determination on credibility. WAC 34.05.461(3). The Presiding Officer found that the Respondent on June 19, 2001 exchanged a 22-oz bottle of beer for a WIC check. Based upon this violation, the Presiding Officer concludes that a mandatory three-year disqualification should be ordered.

Section H. The Program is required to disqualify a WIC retailer for a pattern of vendor overcharges.

4.25 A mandatory three-year disqualification is also required for “[a] pattern of vendor overcharges.” 7 C.F.R. § 246.12(l)(1)(iii)(C). WAC 246-790-100(6); Program's Exhibit No. 7, p. 9. A “pattern” is defined in state regulations as “more than one documented incidence of noncompliance with WIC program requirements in any given contract period.” WAC 246-790-010(15); Program's Exhibit No. 7, p. 6.

4.26 In this case, the Presiding Officer concludes the Respondent's overcharging for the WIC checks for each of the five compliance purchases between

May 31 and August 28, 2001 evidence a “pattern” of overcharging under WAC 246-790-010(15). Further, the negative variances, which were revealed during the November 2001 Audit, evidenced and confirmed this pattern of overcharging. The Presiding Officer concludes that there was a pattern of overcharging for WIC foods, and that a mandatory three-year disqualification should be ordered.

Section I. The Program is required to disqualify a WIC Retailer for a pattern of unfounded reimbursement claims.

4.27 A mandatory three-year disqualification is required for a “a pattern of claiming reimbursement for the sale of an amount of specific supplemental food item which exceeds the store’s documented inventory of that supplemental food item for a specified period of time.” 7 C.F.R. § 246.12(l)(1)(iii)(B). WAC 246-790-010(6), Program's Exhibit No. 7, p. 9.

4.28 In this case, the Respondent was unable to provide inventory records to substantiate WIC transactions involving four foods during the audit period of May through August 2001. Nonetheless, the Respondent claimed reimbursement for WIC vouchers during the audit period for the four foods audited. The Presiding Officer concludes that there was a pattern of unfounded reimbursement claims and that a mandatory three-year disqualification should be ordered.

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Section J. The Program is required to seek reimbursement for overcharges.

4.29 The WIC Program must seek reimbursement from retailers for documented overcharges. WAC 246-790-100(3). Accordingly, the WIC Program is entitled to reimbursement for overcharges related to the negative variances in food units for the four WIC-approved foods, which were examined in the November 2001 Audit. The Program reasonably calculated the amount of the reimbursement owed. The Program showed by a preponderance of the evidence that it was entitled to reimbursement in the amount of \$4,667.91 for overcharges. An order should be entered affirming the Program's Claim for Reimbursement in the amount of four thousand six hundred sixty-seven and 91/100 dollars (\$4,667.91).

V. FINAL ORDER

Based upon the Procedural History, the Hearing: Issues, Witnesses and Exhibits, the Findings of Facts and the Conclusions of Law stated above in this matter, the Presiding Officer hereby issues the following ORDERS:

5.1 The WIC Program's Notice of Disqualification issued on September 27, 2001 disqualifying the Respondent's participation in the WIC Program for 3 years effective November 1, 2001 is AFFIRMED.

5.2 FURTHER, the WIC Program's Claim for Reimbursement issued on January 4, 2002 against the Respondent in the amount of four thousand six hundred sixty-seven and 91/100 dollars (\$4,667.91) is AFFIRMED.

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THE PARTIES ARE FURTHER ADVISED, pursuant to RCW 34.05.461 and RCW 34.05.470, that within 10 days of service of this Order you may file a petition for reconsideration with the Adjudicative Clerk Office, Department of Health, P.O. Box 47879, Olympia, Washington 98504-7879. The petition shall state the specific grounds upon which relief is requested. The petition for reconsideration shall not stay the effectiveness of this Final Order. The petition is deemed to have been denied if, within 20 days of the date of its filing, the Department has not disposed of your petition or has not served you with written notice specifying the date by which action will be taken on your petition.

“Filing” means actual receipt of the document by Adjudicative Clerk Office. RCW 34.05.010(6). This Order was “served” upon you on the day it was deposited in the United States mail. RCW 34.05.010(19).

Proceedings for judicial review may be instituted by filing a petition in the Superior Court in accord with the procedures specified in Title 34 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review must be filed within 30 days after you have been served with this Final Order, as provided by RCW 34.05.542.

DATED THIS 24th DAY OF JULY, 2002.

_____/s/_____
ARTHUR E. DeBUSSCHERE, Health Law Judge
Presiding Officer